80-678

NO. _____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

HAROLD FARRIS, JODY SATIACUM
and ALLEN DUDLEY POWELL,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the gambling provisions of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955, extend to Indians on Indian lands who are immune from state law.

2. Whether the court's finding that a person can transgress state law by conduct not punishable under that state law, is inconsistent with minimum notions of notice and fairness under the due process clause of the United States Constitution.

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Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

The Petitioners, HAROLD FARRIS, JODY SATIACUM, and ALLEN DUDLEY POWELL, respectfully pray that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 624 F.2d 890

(1980). The opinion, as filed, is reproduced in Appendix A to this petition.

The order of the court below denying the petitioners' request for rehearing is reproduced in Appendix B to this petition. The order of the court below denying the petition for rehearing and filed on August 14, 1980, contains several minor deletions from the text of the opinion.

The opinion of the District Court for the Western District of Washington was not reported.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals (Appendix A, infra) was entered on June 11, 1980. A timely petition for rehearing was denied on August 14, 1980 (Appendix B, infra). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1), 28 U.S.C. § 1651, and 28 U.S.C. § 2106.

QUESTIONS PRESENTED

1. Whether the gambling provisions of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955, extend to Indians on Indian lands who are immune from state law.

2. Whether the court's finding that a person can transgress state law by conduct not punishable under that state law, is inconsistent with minimum notions of notice and fairness under the due process clause of the United States Constitution.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty or property without due process of law.

Sections (a) and (b) of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955, provide in pertinent parts as follows:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000.00 or imprisoned not more than five years, or both.
>
> (b) As used in this section -- "illegal gambling business" means a gambling business which --
>
> (i) is a violation of the law of a state or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000.00 in any single day.

(Emphasis added.)

STATEMENT OF THE CASE

A. Federal Prosecution

During the latter part of 1977, the petitioners participated in varying degrees, in the conducting of gambling activities on Indian lands within the external boundaries of the Puyallup Indian reservation. The Puyallup Indian reservation is located within the Western District

of Washington and was established under the terms of the Treaty of Medicine Creek, 10 Stat. 1132 (1854). The petitioners, HAROLD FARRIS and JODY SATIACUM are enrolled members of the Puyallup Indian Tribe.

In 1978 the petitioners were indicted in the Western District of Washington for conducting an illegal gambling business "in violation of the laws of the state where the gambling business was conducted" (RCW 9.46). It was alleged that the activities of the petitioners constituted a violation of 18 U.S.C. § 1955.

In separate Federal prosecutions, the petitioners proceeded to trial before the court on a stipulated set of facts. The court is each case found the petitioners guilty of conducting an illegal gambling business in violation of 18 U.S.C. § 1955. It was stipulated at the time of trial that the petitioners thought they could legally engage in the gambling activities. This

understanding was supported in part by a prior order of the court in the Western District of Washington (Appendix C, infra) and the immunity which the petitioners possessed from state law, an immunity subsequently affirmed by the Ninth Circuit Court of Appeals. Seven separate prosecutions were initiated and from convictions all defendants appealed.

B. Decision of the Court Below

The petitioners attacked their convictions on the ground that their gambling business on Indian land did not violate state law, and therefore, did not violate 18 U.S.C. § 1955, which defines an illegal gambling business as one which "is a violation of the law of the state or political subdivision in which it is conducted."

In affirming the convictions, the court below held that as a general rule, Federal laws applicable throughout the

United States were found to apply with equal force to Indians on reservation. United States v. Wheeler, 435 U.S. 313 (1978). Although three exceptions were found to exist to this rule, none were applicable to the cases on appeal.

The issue which divided the court and which the petitioners assert in this petition was the contention that even if § 1955 is applicable to Indians, they did not violate the statute. This contention was based on the premise that gambling on reservation was not in violation of the law of the state, because Washington State gambling laws do not extend past reservation boundaries.

The court found the petitioners to be correct in their premise that the State of Washington lacked jurisdiction to enforce its gambling laws (RCW 9.46) against the Puyallup Indians on their reservation. The

traditional rule that states have no criminal jurisdiction over offenses committed by Indians on Indian land was found to apply. This immunity from state criminal jurisdiction was supported on several theories. Immunity was found to be an aspect of tribal sovereignty. United States v. Wheeler, 435 U.S. 313 (1978). The Treaty of Medicine Creek, 10 Stat. 1132 (1854), contains language held to preserve Indian self government as against state regulation. Williams v. Lee, 358 U.S. 217 (1959). Lastly, under the Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 ("Public Law 280") Washington courts do not have jurisdiction over crimes committed by Indians on Indian lands, unless the tribe requests the state to assume jurisdiction, which the Puyallup Tribe has not done.

The fact that the petitioners' acts were found not to violate Washington State

gambling laws was not found to be fatal to their prosecution. The court held that their actions were a violation of the law of the state "for the purposes of Section 1955". This holding was based, in part, on an interpretation by the court that the "violation of the law of the state" language was a limitation inserted by Congress to exempt those businesses "not contrary to a state's public policy on gambling". The Ninth Circuit held that it was sufficient that the petitioners' activities violated the Washington State policy on gambling, wherein that state prohibits and regulates certain types of gambling activity.

The petitioners further attack their conviction on the grounds that § 1955 is unconstitutionally vague as applied to Indians, and violates fundamental fairness under the due process clause by applying § 1955 to Indians who in good faith believe

that state gambling laws do not reach their reservation.

REASONS FOR GRANTING THE WRIT

1. The Gambling Provisions of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955, Do Not Extend to Indians on Indian Land Who Are Immune From State Law

Petitioners' prayer for the issuance of a Writ should be granted as the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been but should be settled by this Court.

The petitioners' first contention is that their acts did not violate the clear and unambiguous provisions of 18 U.S.C. § 1955. That statute defines an illegal gambling business as one which "is a violation of the law of the state in which it is conducted". A reading of the indictments issued in this case will evidence that the petitioners were charged with engaging in

an alleged gambling business in violation of the laws of the state where the gambling business was conducted (RCW 9.46). The citation to RCW 9.46 is to the Washington State statutes regulating gambling within the State of Washington.

It is this threshold violation of state law which allows for the applicability of § 1955 to the alleged acts of these petitioners. This Court has previously held that a violation of state law was a jurisdictional element which must be proven by the government. Sanabria v. United States, 437 U.S. 54 (1978). Absent a violation of state law, federal courts are deprived of criminal jurisdiction, for such is the purpose of the statutory limitation.

The Court below held that the violation of state law limitation was for the purpose of excluding from the statute, operations of gambling businesses that are

not contrary to a state's public policy on gambling. Thus it appears be the position of the Court below that a violation of the public policy of a state is tantamount to a "violation of the law of the state". There is no question but that the State of Washington in enacting legislation regulating gambling, presented a public policy on gambling. However, that state public policy does not have universal application. It is limited by traditional notions of jurisdiction.

Courts interpreting and applying the Organized Crime Control Act of 1970 have held that the words "in violation of the law of the state" can be reasonably construed only to cover gambling businesses that are in violation of state penal laws. United States v. Gordon, 464 F.2d 357 (9th Cir. 1972); United States v. Chiarizio, 525 F.2d 289 (2d Cir. 1975); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973).

To declare that the State of Washington lacked jurisdiction over the acts of the petitioners and nonetheless to find a violation within the meaning of § 1955, is to ignore the concept of jurisdiction and to violate the ordinary meaning of those words used by Congress in defining when the federal government would have jurisdiction.

Moreover, the legislative history of the Organized Crime Control Act does not support the Court's interpretation that Congress intended to punish conduct that violates a state policy on gambling as well as conduct which violates state penal laws. The statute was designed to aid local law enforcement where local and state governments have been rendered powerless because of the corruption of responsible officials. 116 Cong. Rec. 604 (1970); S. Rep. No. 617, 91st Cong., 1st Sess. 16 (1969); 116 Cong. Rec. 35295 (1970). The Act was not designed to "inject the federal government

into a responsibility traditionally left to the states". S. Rep. No. 617, 91st Cong., 1st Sess. 74 (1969). As stated by Circuit Judge Browning in his dissent (Appendix A, infra), "Conduct that violates state law only in the sense that it is contrary to state policy, and that it is subject neither to criminal penalties nor to civil sanctions imposed at the instance of law enforcement officials, would not pose the problems with which Congress was concerned". Thus it is the position of the petitioners that the clear language of the statute does not support the interpretation used by the Ninth Circuit Court of Appeals to reach the conduct of the petitioners which was not otherwise subject to state law. Such an interpretation violates the clear meaning of the words contained in the statute.

2. The Decision Below Raises Conflicts With the Due Process Principles of Vagueness and Fundamental Fairness

As noted earlier, the Court below declined to rule that § 1955 was unconstitutionally vague or violated fundamental fairness as applied to the Indians in this case. However, this Court must question what Circuit Judge Browning in his dissent calls, "the idea that a person can transgress state law by conduct not punishable under that state law, is inconsistent with minimum notions of notice and fairness".

This Court has traditionally held that due process requires that criminal statutes be reasonably definite as to the persons and conduct within their scope. In determining whether a legislative, or in this case, judicial definition is vague, it is appropriate to inquire whether the law gives fair notice to those persons potentially subject to it. Further, inquiry can

be made as to whether the statute, as defined, adequately guards against arbitrary and discriminating enforcement.

The traditional test used by this Court has been whether "men of common intelligence must necessarily guess at the meaning and differ as to its application". Connally v. General Construction Co., 269 U.S. 385 (1926). Undue vagueness in the statute will result in its being held unconstitutional, whether the uncertainty goes to the persons within the scope of the statute, or the conduct which is forbidden. Lanzetta v. New Jersey, 306 U.S. 451 (1939); Interstate Circuit, Inc. v. the City of Dallas, 390 U.S. 676 (1968).

In applying this test the court has stressed that everyone is entitled to be informed what the law commands and what the law forbids. In United States v. Weitzel, 246 U.S. 533, it was stated that "the fact

that a particular activity may be within the classification and policy of those covered by the statute, does not necessarily bring it within the ambit of the criminal prohibition".

The opinion of the Court below raises several questions as to whether the petitioners had notice that their conduct was within the ambit of § 1955. The petitioners in this case labored under the belief that their conduct was not a violation of the Washington State gambling laws, as the state lacked criminal jurisdiction over the conduct of Indians on Indian land. Can it be fairly said that the petitioners had notice that their conduct violated the "public policy" of the Washington State Gambling Act, and therefore constituted a "violation of the laws of the state" under § 1955? Would this Court also hold the petitioners to know and to appreciate what

constituted the "public policy" of the State of Washington relative to its gambling laws?

In reviewing the opinion of the Court below against the constitutional tests for vagueness and fundamental fairness, it is readily apparent that men of common intelligence must necessarily guess as to the meaning of § 1955 as interpreted by the Ninth Circuit in this case. Further, it is readily apparent that men of common intelligence would have to guess as to whether the provisions of § 1955 applied to the petitioners' conduct. This is of particular import in light of our long tradition of strictly construing criminal statutes.

CONCLUSION

The decision below is erroneous for the reasons stated. It is a decision which violates Indian immunities. It is a

decision which violates the otherwise clear provisions of the Organized Crime Control Act. Further, the judicial interpretation of the language of § 1955 violates the due process principles of vagueness and fundamental fairness. Lastly, it should be noted that should the petitioners prevail, widespread gambling would not take place. As stated by the Court below, the gambling laws of a state wherein a reservation is located, have been held to be enforceable on Indian reservations under the Assimilative Crimes Act, 18 U.S.C. §3. United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950). The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

JOHN J. O'CONNELL
Attorney for Petitioners

APPENDIX A

[Filed
June 11, 1980]
Clerk, U. S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3517
	)	
v.	)	DC CR 78-40-1
	)	
HAROLD FARRIS,	)	
	)	
Defendant-Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3567
	)	
v.	)	DC CR 78-52-1
	)	
JODY SATIACUM,	)	
	)	
Defendant-Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 79-1013
	)	
v.	)	DC CR 78-35
	)	
ALLEN DUDLEY POWELL,	)	
	)	
Defendant-Appellant.	)	
	)	

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS J. BAKER, Defendant-Appellant.	No. 78-1015 DC CR 78-40-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAY TURNIPSEED, BERTHA TURNIPSEED, and MACKENZIE TURNIPSEED, Defendant-Appellant.	No. 79-1313 DC CR 78-76T-1/2/3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID PAINTER, Defendant-Appellant.	No. 79-1337 DC CR 78-76-4

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 79-1338
	DC CR 78-76-5
v.	OPINION
MELVYN LOCKWOOD, Defendant-Appellant.	

Appeal from the United States District Court for the Western District of Washington

Before: BROWNING, CHOY and KENNEDY, Circuit Judges. CHOY, Circuit Judge:

Appellants attach their convictions under 18 U.S.C. § 1955 on the ground that their large-scale gambling businesses on Indian trust land did not violate state law, and on other grounds. We affirm.

I. Background: The Law

Enacted as part of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 reads in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling

business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section --

(1) "illegal gambling business means a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(Emphasis added.)

We held in United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) (en banc), that § 1955 "was aimed at curtailing syndicated gambling, the lifeline of organized crime, which provides billions of dollars each

year to oil its diversified machinery." Id. at 998. "Congress determined that organized crime posed a major threat to American society and that illegal gambling operations provided organized crime with its greatest source of revenue." Id. at 999.

Judge Browning correctly says that § 1955 was designed to aid the enforcement of state law, especially where state enforcement is disabled by the corruption of state officials, but the statute also serves to further independent federal interests. Congress found that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof," id. at 999; moreover, "[t]he illicit operations were seen to distort the production of goods for commerce and the flow of goods in interstate commerce," id. at 1000.

Section 1955 is constitutional, even as applied to cases with no connection with interstate commerce or organized crime. Id. at 999-1000. It is not unconstitutionally vague. Id. at 1001-02.

Since Congress has the power to "incorporate by reference" state law, § 1955 does not violate the equal protection component of the due process clause even though it "applies only in states where gambling is illegal." Id. at 1003.

II. Background: The Facts

On the generally disputed facts, appellants stand guilty under this section unless the words "violation of the law of a State" exempt them. In 1977 and 1978, appellants operated significantly profitable casinos on Puyallup Indian reservation land within one mile of Tacoma and 25 miles of Seattle. The casinos, without any approval or license from the Washington

State Gambling Commission, featured black-jack, poker and dice; their large net win was obtained at the expense of a clientele that included many non-Indians and some out-of-staters. Farris, Satiacum, Bertha Turnipseed and MacKenzie Turnipseed are Puyallup Indians; Baker, Powell, Lockwood, Painter and Ray Turnipseed are not.[1/]

III. Issues

A. Applicability of § 1955 to Indians

The Puyallup appellants first claim that § 1955 does not apply to them at all. However, federal laws generally applicable throughout the United States apply with equal force to Indians on reservations. For example, even as to Indians on reservations, federal jurisdiction extends "to crimes over which there is federal jurisdiction regardless of whether there is an Indian involved, such as assaulting a federal officer." United States v. Wheeler, 435 U.S. 313, 330 n.30 (1978);

accord, Walks on Top v. United States, 372 F.2d 422 (9th Cir.) (assaulting a federal officer), cert. denied, 389 U.S. 879 (1967); see United States v. Burns, 529 F.2d 114 (9th Cir. 1976) (possession of firearm by a felon); Head v. Hunter, 141 F.2d 449 (10th Cir. 1944) (forgery to defraud the United States).

There seems to be three exceptions to this rule, but appellants fall within none. First, reservation Indians may well have exclusive rights of self-governance in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978), citing Roff v. Burney, 168 U.S. 218 (1897) (tribal membership); Jones v. Meehan, 175 U.S. 1 (1899) (inheritance rules); and United States v. Quiver, 241 U.S. 602 (1916) (domestic relations). Or, to put it another way,

"Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation." Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970). But even a general federal law suffices to proscribe the large-scale professional gambling involved here; such gambling is neither profoundly intramural (the casinos' clientele was largely non-Indian) nor essential to self-government.

Second, it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians. Antoine v. Washington, 420 U.S. 194 (1975); Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. White, 508 F.2d 453 (8th Cir. 1974). But this rule applies only to subjects specifically covered in

treaties, such as hunting rights, usually, general federal laws apply to Indians. E.g., Superintendent v. Commissioner, 295 U.S. 418 (1935) (income tax). A different norm would only necessitate a huge quantity of statutory boilerplate.

To bring the special rule into play here, general treaty language such as that devoting land to a tribe's "exclusive use" is not sufficient (although such language does suffice to oust state jurisdiction); there would have to be specific language permitting gambling or "purporting to exempt Indians from the laws of general applicability throughout the United States regardless of situs of the act." United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1976). Of course, there is no such specific language in the United States' treaty with the Puyallups, the Treaty of Medicine Creek, 10 Stat. 1132 (1854).

Finally, if appellants could prove by legislative history or some other means that Congress intended § 1955 not to apply to Indians on their reservations, we would give effect to that intent. But no evidence of such Congressional intent exists; indeed, "it defies reason to suppose that Congress intended" such an exemption, see United States v. Montana, 604 F.2d 1162, 1168 (9th Cir. 1979). Puyallup casinos in the Tacoma-Seattle area would flourish as mightily as those in such areas as Las Vegas and Atlantic City. Exempt from federal and state regulation, casinos on Indian land would defeat or endanger the federal interests of protecting interstate commerce and preventing the takeover of legitimate organizations by organized crime. We think the following passage from United States v. Montana bears repeating:

> We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, viz. commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.

Id. at 1169. We find that Congress did not intend that Indians could freely engage in the large-scale gambling businesses that it forbade to all other citizens.

Therefore, we hold that § 1955 applies to appellants.

B. "Violation of the Law of a State"

1. Puyallup Appellants

The Puyallup appellants argue that even if § 1955 applies to them, they are not guilty of violating it. The casinos

they operated on reservation land were not "in violation of the law of a State," they say, because the Washington state gambling laws do not extend past the reservation boundaries. We hold that appellants' premise is correct, but that their conclusion does not follow.

a. State Jurisdiction Over Gambling

The originally independent Indian nations, after conquest or acceptance of United States protection, came under federal control and the plenary power of Congress to remove every aspect of sovereignty from them. "But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Unites States v. Wheeler, 435 U.S. 313, 323 (1978).

The treaty with the Puyallups is the Treaty of Medicine Creek, 10 Stat. 1132 (1854). Article II of the Treaty says that reservation land shall be "marked out for their exclusive use." Comparable language in other Indian treaties has been held to preserve Indian self-government as against state regulation. E.g., Williams v. Lee, 358 U.S. 217, 221-22 (1959).

Therefore, the traditional rule is that states have no criminal jurisdiction over offenses committed by Indians on Indian trust land. The rationale for this rule, however, has been changing: "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973); compare Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The Ninth

Circuit takes the modern position. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658-59 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977).

However, in 1953 Congress delegated to the states some of its power to regulate affairs on Indian reservations, by passing the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 ("Public Law 280"). Section 2 of "Public Law 280," codified at 18 U.S.C. § 1162(a), immediately placed enumerated Indian lands near the full criminal jurisdiction of the states they were located in. (This section did not include the Puyallup land.) Section 7 of "Public Law 280" gave the necessary federal consent for states to take full criminal jurisdiction over all other Indian lands, if the state passed legislation to that effect. Under this section, Washington in 1963 enacted Wash. Rev. Code § 37.12.010 and took jurisdiction over its Indians and

Indian lands (including the Puyallups and their land). However, as to acts both committed by Indians and committed on Indian land, Washington took jurisdiction only over eight specific subject areas -- chiefly welfare, family law and motor vehicles -- but not gambling. Apart from this statute, the Washington courts do not have jurisdiction over crimes committed by Indians on Indian land, unless the tribe in question has requested the state to assume jurisdiction. See Arquette v. Schneckloth, 56 Wash. 2d 178, 351 P.2d 921 (1960). This partial assertion of jurisdiction was recently upheld in Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979).[2/]

On the other hand, § 37.12.010 asserted full criminal jurisdiction in all subject areas over offenses committed on Indian land by non-Indians. This state jurisdiction is "complete." 439 U.S. at

498. Indeed, it is fitting for a state to take such jurisdiction over non-Indians, for under no circumstances could such offenders be tried in tribal courts anyway. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

In sum, Washington may not enforce its gambling laws against the Puyallups on their reservation; however, it may enforce those laws against non-Indians, even on the Puyallup reservation.

b. No Immunity From § 1955

Given that Washington cannot enforce its gambling laws against the Puyallup appellants for their actions on Puyallup trust lands, nonetheless their actions were a "violation of the law of a State" for purposes of § 1955. The reason for that limitation was not to exempt from federal criminal liability those gambling-business operators who might be beyond the reach of a state's criminal jurisdiction, but rather

to exempt from the federal statute the operators of gambling businesses that are not contrary to a state's public policy on gambling. Congress' intent was merely that § 1955 not apply indiscriminately to Nevada casino operators, Florida fronton operators, etc. Section 1955 as written "applies only in states where gambling is illegal." United States v. Sacco, 491 F.2d at 1003.

Washington public policy prohibits the type of gambling business conducted by appellants. See Wash. Rev. Code §§ 9.46.010, 9.46.220. Therefore, for the purposes of the federal statute, their business was a "violation of the laws of a State . . . in which it is conducted." The policy underlying § 1955 is that large-scale gambling is dangerous to federal interests wherever it occurs. The limitation of § 1955 to gambling that is a "violation of the law of a State or political subdivision in which

it is conducted" does not reflect a Congressional judgment that gambling countenanced by state and local authorities does not harm federal interests; rather, it reflects Congress' judgment that the harm is outweighed by the interest of federalism that national legislation not trample the desires of particular states, which on the subject of gambling are expressed by the lack of prohibitory laws.

If the appellants' argument prevailed, the federal interests served by § 1955 would be thwarted, without any benefit to the countervailing federalism interest. Casinos would operate in a major population center without any state or federal (or tribal) regulation. It would not be long before organized crime moved in on this golden opportunity. As the appellants ironically take pains to point out, one purpose of § 1955 was to prevent organized-

crime infiltration of legitimate organizations. S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). The federal law could thus be most appropriately applied here, for the casino operations placed the tribe in danger of mob takeover, whether it realized it or not. Moreover, the other major evil of large-scale gambling --- harm to the national economy -- arises regardless of whether a casino is on Indian or non-Indian land, especially when the clientele is not limited to Indians.

In this Circuit, "the immunity of Indian use of trust property from state regulation [is] based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement." Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 666 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). Under this view, it would be most inappropriate for immunity from state

regulation to defeat the federal policies of opposition to large-scale gambling, protection of legitimate organizations from organized-crime infiltration, and promotion of the welfare of Indians. Therefore, we hold that § 1955 extends even to Indians on Indian lands who are immune from state law, and the convictions of Farris, Satiacum, Bertha Turnipseed and MacKenzie Turnipseed are affirmed.

2. Non-Puyallup Appellants

Since § 1955 extends to Indian country, and the Washington gambling laws extend to non-Puyallups on Puyallup land, there is no doubt that the § 1955 convictions of non-Puyallups Baker, Powell, Lockwood, Painter, and Ray Turnipseed must be affirmed.[3/]

C. Other Arguments

The several other arguments that appellants raise lack merit.

1. Preemption

Appellants assert that 15 U.S.C. § 1175, which specifically makes it "unlawful to . . . possess . . . any gambling device . . . within Indian country," should be construed to preempt the field of federal regulation of gambling on reservations and make § 1955 inapplicable there. But the phrase "gambling device" in § 1175 is limited in 15 U.S.C. § 1171(a) to slot machines and other gambling machines and mechanical devices, which the casinos here were conspicuously cautious to avoid. Section 1955 covers all kinds of gambling, including the kinds involved in this case. Moreover, the comprehensive § 1955 was passed 19 years after § 1175. Therefore, we hold that § 1175 does not preempt all other federal regulation of gambling on reservations, and the United States was free to proceed, in the exercise of prosecutorial discretion, under § 1955. See

Hutcherson v. United States, 345 F.2d 964, 967 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965).

Nor are we convinced that § 1955's harsher penalty proves that Congress meant only § 1175 to apply to Indians. The federal interests challenged by a violation of § 1955 (large-scale gambling subject to mob involvement) are more weighty than those affected by a violation of § 1175 (possession of a gambling machine on an Indian reservation). Moreover, the harm to the federal interests protected by § 1955 of a casino on Puyallup land would be as great as that flowing from a similar casino in San Francisco or Chicago.

2. Exemption from State Law

The Puyallup appellants argue that if the state gambling laws may be enforced against them through § 1955, their treaty-based right to be free from the state

criminal jurisdiction will be vitiated. But the Puyallups are subject to the plenary criminal jurisdiction of Congress, which can freely adopt state gambling laws expressly or by reference. Especially is this true where Congress acts not merely in aid of state law, but to secure independent federal interests, as it did by enacting § 1955. Moreover, Washington state's gambling laws would be enforceable by the United States against Puyallups on their reservation even in the absence of § 1955. The enclave laws of the United States are extended to Indian country by 18 U.S.C. § 1152 (but not as to "offenses committed by one Indian against the person or property of another Indian," id.). One such enclave law is the Assimilative Crimes Act, 18 U.S.C. § 13.[4/] Therefore, we have held that Washington's prohibitory (but not regulatory) laws can be enforced by the

federal government on the Puyallup reservation. United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977); see United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950). Like the Washington law against the possession of dangerous fireworks, considered in Marcyes, the Washington law against professional gambling is prohibitory despite a number of "limited exceptions." See 557 F.2d at 1364; Wash. Rev. Code § 9.46.220. Also, operating a casino with a non-Indian clientele is not an "offense" committed by one Indian against the person or property of another Indian."

3. Vagueness

Appellants claim that § 1955 is unconstitutionally vague as applied to Indians, relying on the well-recognized rule of construction that statutory ambiguities are to be resolved in favor of Indians. Their argument is that the state gambling regulations are so voluminous and

detailed that an intelligent Indian could not understand them. We reject this novel argument that detail creates vagueness. Moreover, these appellants were not tripped up by a detail, but flagrantly violated the core of the state law, albeit they were beyond the state's jurisdiction.

4. Fundamental Fairness

Appellants also raise a due process (fundamental fairness) point against applying § 1955 to an Indian who in good faith believed that state gambling laws did not reach him on the reservation. But this prosecution is under the federal § 1955, which the Puyallup appellants apparently gave no thought to, and did violate. Any unfairness that they might feel subjected to here does not rise to the level of a due process/fundamental fairness violation, especially considering that their conduct was not exactly simon-pure.

5. Tribal Regulation

Although the Puyallup Tribe temporarily enacted a Gambling Code after the events involved in this case, no such tribal regulation was in effect at the time appellants' casinos were operating. Therefore we need not consider what effect such tribal regulation would have.

6. Freedom From Organized-Crime Influence

Some appellants argue that their casino was never polluted by organized crime. This does not, however, prevent conviction under § 1955. United States v. Sacco, 491 F.2d at 1000.

7. Instructions as to Baker

Baker contends that it was error to refuse his proffered instructions that state gambling laws do not apply to Indians on Indian land and that the Government must prove beyond a reasonable doubt that he

knew his gambling operation violated state law.

Since Baker is not an Indian, the refusal of the first request was harmless, at worst. On the specific intent point, the court instructed that § 1955 requires "specific intent to facilitate an activity which the accused knew to be unlawful under state law." This captured the gist of Baker's request and may in any event have been a more favorable instruction than the law entitled him to.

IV. Conclusion

The convictions of all the appellants are AFFIRMED.

s/Herbert Y.C. Choy
United States Circuit Judge

Footnotes

1. [Reference on page 4]

Powell is one-fourth Cherokee. Because only Puyallups are exempt from state regulation on the Puyallup reservation, however, we consider him a non-Indian for the purposes of this case.

2. [Reference on page 9]

In 1968 Congress passed the Indian Civil Rights Act, retracting from the states some of this power to assert jurisdiction. Previous assertions were honored, but for a future assertion to be effective not only must the state enact legislation, but tribal consent must also be obtained. 25 U.S.C. § 1321(a). The Puyallups have never given their consent to any state jurisdiction. Thus Wash. Rev. Code § 37.12.010 would be invalid if it were passed for the first time today, but it is valid law because it was passed in 1963, during the reign of Section 7 of "Public Law 280."

3. [Reference on page 11]

Baker was also found guilty of violating 18 U.S.C. § 1952 for his interstate travel in aid of his gambling business. We affirm this conviction for the same reasons we affirm his § 1955 conviction.

4. [Reference on page 13]

> Whoever within [a federal enclave] is guilty of any act or omission which, although not made punishable

> by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13.

[Filed June 11, 1980]
Clerk, U.S. Court of Appeals

UNITED STATES v. FARRIS et al.
Nos. 78-3517 et seq.

BROWNING, Circuit Judge, concurring in part, dissenting in part:

I concur in Judge Choy's opinion insofar as it affirms the conviction of defendants who are not Puyallup Indians.

The indictments charged that the various defendants had engaged in "an illegal gambling business . . . involving the playing of blackjack, poker and dice in violation of the law of the State where the gambling business was conducted (R.C.W. 9.46)." The chapter of the Revised Code of Washington cited in the indictments provides for the licensing and regulation of gambling activities, and imposes criminal penalties for violation of the statute (R.C.W. 9.46.180), or of regulations

adopted pursuant to the statute (R.C.W. 9.46.185).

It is conceded that the State could not prosecute the Puyallup appellants under the provisions of the Washington Code cited in the indictment. As Judge Choy points out, the State of Washington has elected not to exercise jurisdiction over gambling offenses committed by Indians on Indian lands unless the tribes request the State to do so, and the Puyallups have not. The decision not to assert jurisdiction expresses the State's general policy to exercise criminal jurisdiction over Indian reservations in a way that leaves "play for tribal self-government." Washington v. Yakima Indian Nation, 439 U.S. 463, 499 (1979).

Nevertheless, Judge Choy adopts the position that the actions of the Puyallups "were a 'violation of the law of a state'

for purposes of § 1955." This interpretation of the statute seems to me to be untenable. It exceeds the limits of reasonable construction to hold that conduct which could not be punished under the state law is nonetheless "a violation of the law of [the] State" within the meaning of 18 U.S.C. § 1955. Conduct to which the law is inapplicable does not violate the law in the ordinary meaning of those words. The idea that a person can transgress state law by conduct not punishable under that state law is inconsistent with minimum notions of notice and fairness.

Nothing in the legislative history of section 1955 supports the thesis that Congress intended to punish conduct that violated a state's policy on gambling even though it did not violate state law. The expressed purpose of Congress was to confer federal jurisdiction over the major forms of "illegal gambling" (see e g., H.R. Rep.

No. 1549, 91st Cong., 2d Sess. 53 (1970); S.Rep. No. 617, 91st Cong., 1st Sess. 73 (1969)), and there is no reason to suppose that the term "illegal gambling" was used in any but its common sense of "in violation of the law."

The federal statute was intended to aid local law enforcement efforts. Congress did not intend to assert federal jurisdiction where state law allowed no local law enforcement effort at all. In the words of the Senate floor manager, the purpose of the federal statute was to "add to . . . local efforts the expertise, the manpower and the full resources of the Federal Bureau of Investigation, and other appropriate agencies of the Federal Government" (emphasis added). 116 Cong. Rec. 591 (1970) (remarks of Senator McClellan). Section 1955 was designed to improve "the established State-Federal law enforcement partnership", solitary federal action was

seen to be necessary "where local and State governments have been rendered powerless because of the corruption of the responsible officials." 116 Cong. Rec. 604 (1970) (remarks of Senator Allott). "This limited federal intervention should serve to reinforce the powers of the States and local governments in our federal system, rather than inject the Federal Government into a responsibility traditionally left to the state." S. Rep. No. 617, 91st Cong., 1st Sess. 74 (1969).

Judge Choy's opinion justifies an expansive reading of section 1955 based on a supposed "policy underlying § 1955 . . . that large-scale gambling is dangerous to federal interests wherever it occurs." The legislative history suggests no such policy. Congress was not concerned with gambling per se. The statute was addressed to what Congress perceived as a vicious circle of illegal gambling resulting in

large profits which the criminal element then used to corrupt local officials -- to purchase protection for illegal gambling and other unlawful activities, thus further expanding their illegal operations and increasing their profits. In the preamble to the portion of the Organized Crime Control Bill that later became 18 U.S.C. § 1955, the Senate made the special finding that illegal gambling operations thwarted the enforcement of criminal laws by "the corruption and bribery of State and local official." S. Rep. No. 617, 91st Cong., 1st Sess. 16 (1969). The same belief was expressed in the House. 116 Cong. Rec. 35295 (1970) (remarks of Congressman Poff). Federal intervention was thought necessary to make state and local laws effective "where local and state governments have become, in effect, incapable of law enforcement by reason of the corruption of

responsible officials." S. Rep. No. 617 at 74. The prohibition of illegal gambling businesses were coupled with a prohibition of conspiracies to obstruct state law in furtherance of illegal gambling. See Organized Crime Control Act of 1970, Title VIII, Part B, 94 Stat. 922 (1970), codified as 18 U.S.C. § 1511.

Conduct that violates state law only in the sense that it is contrary to state policy, and that is subject neither to criminal penalties nor to civil sanctions imposed at the instance of law enforcement officials, would not pose the problems with which Congress was concerned. In the case at hand, for example, there was no need for the Puyallups to bribe state officials when there was no law under which the state could prosecute them.

Under the theory expressed in Judge Kennedy's concurrence, all those involved

in a gambling business would be subject to federal prosecution if the involvement of any of them violated state law. The legislative history does not support so expansive a reading: there is nothing to suggest that Congress intended persons innocent under state law to answer under Section 1955 for the crimes of their associates.

Because no state or local law prohibited the actions of the Puyallup defendants, 18 U.S.C. § 1955 does not apply. The convictions of these defendants should be reversed.

[Filed June 11, 1980]
Clerk, U.S. Court of Appeals

United States v. FARRIS et al.
Nos. 78-3517 et seq.

KENNEDY, Circuit Judge, concurring:

I concur in the affirmance of the convictions of all the appellants. Although there are persuasive policy reasons, elaborated in Judge Choy's opinion, for applying section 1955 to the Puyallup appellants, I am more persuaded by a simple and literal reading of the statute. The statute makes it a violation of federal law to operate "an illegal gambling business." The federal statute focuses on whether the business itself is "a violation of the law of a State," and the gambling operation in this case necessarily involved violation of state law, inasmuch as the non-Indian partners were subject to state prosecution by their operation of the business. This is sufficient to constitute the business

itself, in its entirety, an "illegal gambling business" for the purposes of section 1955. That only some of the acts of the operators of the business were subject to state prosecution is to me immaterial to the question whether or not the business is an illegal gambling business for the purposes of federal law. The gambling casino in question was a single entity, an entity that was operated in violation of Washington law, and there was no separate, legally isolated portion of the gambling casino in which the Indians alone were involved.

If section 1955 were to read: "Whoever conducts, finances, manages, . . <u>in violation of state law</u>, a gambling business shall be fined not more than $20,000 or imprisoned not more than five years," then we would be presented with the issue upon which Judge Browning bases his dissent. The italicized language is,

however, not in the statute. In my view, the reading of the statute I propose is not only literally persuasive, but also rests on the common-sense proposition that a gambling enterprise that entails clear and unambiguous violations of state law by the non-Indian operators is certainly no less within either the policy or the plain language of section 1955 merely because it also entails acts by Indian operators that may or may not be violations of state law. It is a defendant's involvement in a business that a state prohibits, rather than his commission of particular individual acts that a state may prosecute, that constitutes the defendant's violation of section 1955. I would leave for another day the question addressed by Judges Browning and Choy whether or not the

federal statute would also prohibit a gambling business operated exclusively by Indians on a reservation.

_____

United States Circuit Judge

APPENDIX B

[Filed
August 14, 1980]
Clerk, U. S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3517
	)	
v.	)	DC CR 78-40-1
	)	
HAROLD FARRIS,	)	
	)	
Defendant-Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3567
	)	
v.	)	DC CR 78-52-1
	)	
JODY SATIACUM,	)	
	)	
Defendant-Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 79-1013
	)	
v.	)	DC CR 78-35
	)	
ALLEN DUDLEY POWELL,	)	
	)	
Defendant-Appellant.	)	
	)	

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS J. BAKER, Defendant-Appellant.	No. 78-1015 DC CR 78-40-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAY TURNIPSEED, BERTHA TURNIPSEED, and MACKENZIE TURNIPSEED, Defendant-Appellant.	No. 79-1313 DC CR 78-76T-1/2/3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID PAINTER, Defendant-Appellant.	No. 79-1337 DC CR 78-76-4

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-1338
	)	
v.	)	DC CR 78-76-5
	)	
MELVYN LOCKWOOD,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	

Before: BROWNING, CHOY and KENNEDY, Circuit Judges,

The Opinion in this case is amended (1) by deleting the sentence on page 10, lines 26-28 ("Casinos would operate in a major population center without any state or federal (or tribal) regulation."); (2) by amending the succeeding sentence to read, "It might not be long before organized crime invaded the Puyallup reservation."; (3) by deleting the first six words of the sentence on page 6, line 23 ("Exempt from federal and state regulation".)

The petitions for rehearing of Baker, Farris, Satiacum and Powell are denied. We interpret the Turnipseeds' petition for

rehearing en banc also to be a petition for rehearing; the petition for rehearing to the panel is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff v. ROBERT SATIACUM, LUCKY INDIAN CASINO 'N BAR, EDWARD WAYNE CUTLER, RICHARD LAWRENCE FLINK, DANIEL JAMES SATIACUM, CLARENCE BERT BUTLER, GENE ALLEN THOMAS, KAREN LEE SATIACUM, YOSHIKO OUCHI PHEMISTER, and BOYD TAYLOR RINES, Defendants.	)	NO. C76-101T INJUNCTION

Robert Satiacum, Lucky Indian Casino 'N Bar, Edward Wayne Cutler, Richard Lawrence Flink, Daniel James Satiacum, Yoshiko Ouchi Phemister and Boyd Taylor Rines, their agents, employees, representatives, officers, associates, and/or those acting in concert or participation with any of the foregoing are each hereby enjoined from:

Running, operating, conducting, financing, supervising, directing, owning or providing equipment or services to any gambling activity that violates Federal law, including gambling activities in violation of Washington State law, or any Indian Reservation within the Western District of Washington. As to those gambling activities which are licensable under Washington State Law, defendants shall be permitted on any Indian Reservation in the same gambling activities which are being licensed outside of Indian Reservations by the Washington State Gambling Commission at the time in question.

DATED this 21st day of January, 1977.

s/
United States District Judge

Approved for Entry:

s/Jack E. Tanner
JACK E. TANNER, Attorney
for Defendants
Robert Satiacum; Lucky Indian
Casino 'N Bar; Edward Lynn Cutler,
Richard Lawrence Flink; Daniel
James Satiacum; Clarence Bert
Butler; Karen Lee Satiacum; Yoshiko
Ouchi Phemister; and Boyd Taylor
Rines

s/John E. Robinson
JOHN E. ROBINSON, Attorney
for Gene Allen Thomas

s/J. Ronald Sim
J. RONALD SIM
United States Attorney

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